No. 91-819

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

RUTGERS, THE STATE UNIVERSITY; BOARD OF GOVERNORS OF RUTGERS, THE STATE UNIVERSITY; and DR. EDWARD J. BLOUSTEIN,
Petitioners,

v.

DR. ALFRED BENNUN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, NEW YORK UNIVERSITY, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, THE TRUSTEES OF PRINCETON UNIVERSITY, THE UNIVERSITY OF MICHIGAN, AND THE UNIVERSITY OF PENNSYLVANIA IN SUPPORT OF PETITIONERS

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MOTION OF THE AMERICAN COUNCIL ON EDUCATION, NEW YORK UNIVERSITY, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, THE TRUSTEES OF PRINCETON UNIVERSITY, THE UNIVERSITY OF MICHIGAN, AND THE UNIVERSITY OF PENNSYLVANIA FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The American Council on Education, New York University, the Regents of the University of California, the Trustees of Princeton University, the University of Michigan, and the University of Pennsylvania hereby move pursuant to Rule 37.2 of the Rules of this Court for leave to file the accompanying brief as *amici curiae* in support of petitioners. Petitioners' counsel have consented to the filing of this brief and consent of respondent's counsel has been requested but was denied.

New York University, Princeton University, the University of California, the University of Michigan, and the University of Pennsylvania ("the Universities") are private and public universities regularly engaged in the process of making decisions concerning tenure and academic promotion. In making these decisions, the Universities rely upon the mechanism of peer review, which aptly has been described "as essential to the very lifeblood and heartbeat of academic excellence." *EEOC* v. *University of Notre Dame du Lac*, 715 F.2d 331, 336 (7th Cir. 1983). The American Council on Education is a voluntary membership organization representing more than half of all American colleges and universities. The intersts of all movants as *amici* are more fully described in the accompanying brief (pp. 1-2).

The movants seek to raise important matters not fully addressed by the parties concerning the potential threat to the peer review system of faculty evaluation presented by an overreaching application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, in the academic employment context. Movants believe that their broader perspective on the issue presented by petitioners will assist the Court in evaluating the national importance of the decision below.

For these reasons, the movants request leave to file this brief as *amici curiae* in support of the petition for a writ of certiorari.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

TABLE OF AUTHORITIES—Continued

STATUTES

OTHER AUTHORITIES

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OCTOBER TERM, 1991

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BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, NEW YORK UNIVERSITY, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, THE TRUSTEES OF PRINCETON UNIVERSITY, THE UNIVERSITY OF MICHIGAN, AND THE UNIVERSITY OF PENNSYLVANIA IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

New York University, Princeton University, the University of California, University of Michigan, and the University of Pennsylvania ("the Universities") are private and public institutions of higher education. As such, the Universities are regularly engaged in the process of reviewing candidates for academic appointments, tenure, and promotions. The "peer review" process employed by the Universities and their faculties in making academic

employment decisions lies at the core of academic self-governance.

The American Council on Education ("ACE") is the nation's major coordinating body in postsecondary education. Founded in 1918, ACE is a voluntary membership organization composed of more than 1,300 nonprofit institutions of higher education from both the public and private sectors and more than 175 educational associations and organizations. As an association of more than half of all American colleges and universities, ACE is uniquely able to represent the interests of the higher education community in legal matters of national importance, including the proper interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as it applies to this case.

The Universities and ACE have a direct and powerful interest in the manner in which statutes such as Title VII are applied to academic tenure and promotion decisions. Although each of the Universities has a long-established and demonstrated commitment to eradicating invidious discrimination from their campuses, each also recognizes that governmental scrutiny of academic employment decisions has the potential to trench upon values of academic freedom and legitimate institutional autonomy.

Because of their institutional interest in the development of the law at issue here, the Universities and ACE respectfully seek leave of the Court to participate as *amici curiae* in support of the petitioners in this case.

STATEMENT

Respondent Dr. Alfred Bennun, an associate professor of biochemistry, repeatedly sought promotion to the rank of full professor from his employer, Rutgers, the State University of New Jersey ("Rutgers" or "the University"). At least five times the University subjected Dr. Bennun to the scrutiny of the academic peer-review process and each time the University, acting through Dr.

Bennun's peers, concluded that Dr. Bennun, although showing some accomplishment as a researcher, did not merit advancement under the University's promotion criteria. Dr. Bennun challenged the University's decisions as violative of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging that the University had in fact denied him promotion because he is Hispanic.

At trial, Dr. Bennun produced no direct evidence that any participant in the peer review process at Rutgers had been influenced in any way by discriminatory animus. *See Bennun* v. *Rutgers*, 737 F. Supp. 1393, 1400-01 (D. N.J. 1990), *aff'd in relevant part*, 941 F.2d 154 (3d Cir. 1991). Indeed, there was no evidence of discriminatory animus by the University aimed at either Dr. Bennun or any other employee. Rather, Dr. Bennun rested his case exclusively upon his comparison of his own qualifications with those of candidates who had won promotion to full professor. *Id.*

The district court, applying the analytical framework set out in this Court's opinions in *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), found that Dr. Bennun had carried his burden of making out a *prima facie* case of discrimination.[1] The court also found that the University had carried its burden of articulating a legitimate, nondiscriminatory reason for its action: it had assertedly denied promotion based upon its assessment of Dr. Bennun's overall academic qualifications. *See Bennun*, 737 F. Supp. at 1407. Consequently, the pivotal dispute arose over whether Dr. Bennun had

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[1] Specifically, the court found that Dr. Bennun had proved by a preponderance of the evidence that he was a member of a class protected by the statute, that he sought and was denied a promotion for which he was arguably qualified, and that nonmembers of the protected class won similar promotions. *See Bennun* v. *Rutgers*, 737 F. Supp. 1393, 1398-99, 1401-05 (D.N.J. 1990), *aff'd in relevant part*, 941 F.2d 154 (3d Cir. 1991); see also *Bennun* v. *Rutgers State Univ.*, 941 F.2d 154, 170-77 (3d Cir. 1991).

carried his burden of persuasion that the University's stated reasons for its decision were a mere pretext for racial discrimination.

The district court accepted, as did the court of appeals, Dr. Bennun's argument that it was appropriate for the court to compare his academic credentials with those of other candidates who had won promotion and to decide for itself whether he merited promotion to the rank of full professor at Rutgers. Based solely upon its own assessment of Dr. Bennun's relative strength as a candidate for promotion, the district court declared the University's assessment of Dr. Bennun's merit to be pretextual and ordered that Dr. Bennun be granted a full professorship. *See id.* at 1407-09. The Third Circuit affirmed the district court's Title VII rulings in all respects. *See Bennun* v. *Rutgers State Univ.*, 941 F.2d 154, 170-80 (3d Cir. 1991).[2]

ARGUMENT

I. BACKGROUND: ACADEMIC FREEDOM AND THE APPLICATION OF TITLE VII

There is no dispute that Title VII applies to university employers.[3] A claim of invidious discrimination in academic employment is, and should be, actionable, and the

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[2] Although *amici* are convinced that the process by which the lower courts concluded that Dr. Bennun deserved promotion was fundamentally flawed, they do not mean to imply that Dr. Bennun does not warrant a promotion. That is an issue that *amici* are no better suited to evaluate from a distance than are the courts in this case. *Amici*'s interest is limited to assuring that Title VII is applied to institutions of higher education in a manner that fairly balances their interest in academic autonomy and the public interest in eliminating all invidious discrimination. The decision of the court of appeals fails to strike that balance.

[3] In 1972, Congress repealed the exemption which had previously taken educational employees outside the scope of Title VII's protection. *See University of Penn.* v. *EEOC*, 493 U.S. 182, 189-90 (1990).

federal courts must be permitted to review the disputed employer action to determine whether the complainant was the victim of discrimination. What remains unsettled, however, is whether a university's employment decisions with regard to faculty must be tested against precisely the same standard as applied to non-academic employers.

It is widely accepted that the familiar *McDonnell Douglas-Burdine* analytical framework may be shaped by the demands of particular circumstances. This Court has made clear that the *McDonnell Douglas* framework was "never intended to be rigid, mechanized or ritualistic," *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978), and that the standards of proof required of plaintiffs legitimately may vary depending upon the peculiar factual setting of the complaint, *see McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 n.13 (1973). The question presented by this case—one that has left the circuits in disarray for more than a decade—is whether the *McDonnell Douglas-Burdine* analytical model should be adjusted in the academic employment context. *Compare, e.g., Kunda* v. *Muhlenberg College*, 621 F.2d 532, 545 (3d Cir. 1980) (rejecting modification of the *McDonnell Douglas* model as applied to academic employment decisions) *and Jepsen* v. *Florida Bd. of Regents*, 610 F.2d 1379, 1382 (5th Cir. 1980) (same) with *Villanueva* v. *Wellesley College*, 930 F.2d 124, 128 (1st Cir.) (rejecting "a mechanical application of the *McDonnell Douglas* framework" as applied to academic employment decisions), *cert. denied*, 112 S. Ct. 181 (1991) *and Lieberman* v. *Gant*, 630 F.2d 60, 67 (2d Cir. 1980) ("[academic] freedom cannot be disregarded in determining the proper role of courts called upon to try allegations of discrimination by universities in teaching appointments").[4]

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[4] Likewise, the issues have generated considerable debate but little consensus among commentators. *Compare, e.g.*, Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev.

The First Amendment values at stake are vital. This Court has recognized that "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as 'a special concern of the First Amendment.'" *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) (quoting *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967)). "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also, and somewhat inconsistently, on autonomous decsion-making by the academy itself." *Regents of the Univ. of Mich.* v. *Ewing*, 474 U.S. 214, 226 n.12 (1985) (citations omitted). The Constitution's concern for academic freedom includes "[t]he freedom of a university to make its own judgments as to education," *Bakke*, 438 U.S. at 312 (opinion of Powell, J.), and "to determine for itself on academic grounds who may teach," *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (citation omitted).[5]

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945 (1982) (arguing against applying a different standard to academic employers) *with* Tepker, *Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward a Principled Deference*, 16 U.C. Davis L. Rev. 1047 (1983); Note, *Title VII on Campus: Judicial Review of University Employment Decisions*, 82 Colum. L. Rev. 1206, 1227 (1982) ("First amendment values suggest that universities should be treated differently from other employers under title VII when making independent decisions on matters important in shaping their academic identities."); *and* Note, *The Double-Edged Sword of Academic Freedom: Cutting the Scales of Justice in Title VII Litigation*, 65 Wash. U. L.Q. 445, 468-70 (1987) (concluding that "[t]he *McDonnell Douglas* approach is inadequate" in the academic employment context and proposing a modified system of somewhat higher burdens of proof).

[5] *See generally* Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 Yale L.J. 251, 311-40 (1989); Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 Tex. L. Rev. 1265, 1310-19 (1988); Finkin, *On "Institutional" Academic Freedom*, 61 Tex. L. Rev. 817, 829 (1983).

The constitutional significance accorded to the university's interest in self-governance is rooted in the recognition that educational institutions *are* genuinely different from all other economic and social institutions, and that they occupy a special place in a democratic society.[6] It is the special character of the university that has led this Court to recognize the national "commit[ment] to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967).

Because of the foundational importance of academic inquiry in the life of the nation, this Court has "protected principally and expressly a First Amendment right of the university itself . . . largely to be free from government interference in the performance of core educational functions."[7] Among these core educational functions which lay claim to constitutional protection is the academic peer review process through which universities "determine . . . on academic grounds who may teach." A

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[6] *See Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957) ("The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die"); *cf. NLRB* v. *Yeshiva Univ.*, 444 U.S. 672, 680-81 (1980) (acknowledging, in the context of a suit brought under the National Labor Relations Act, that "principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world'") (quoting *Syracuse Univ.*, 204 N.L.R.B. 641, 643 (1973)).

[7] Byrne, *supra* note 5, at 311 (footnote omitted); *see also Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring) (the Constitution's protection of academic freedom requires "the exclusion of governmental intervention in the intellectual life of a university").

university's hiring and tenure decisions significantly define its future intellectual character and mission. By vesting powerful influence over these decisions in the collective judgment of the university faculty itself, the peer review system ensures that the difficult task of evaluating a scholar's contributions and promise will be assigned to those best suited to the task. In addition, it secures for the university faculty meaningful control over the future life of the university.[8] Indeed,

> [p]eer review is the canonical procedure for determining "who will teach." . . . Peer review consigns evaluation of a faculty candidate in the ordinary course to fellow faculty whom we must presume to be both competent to evaluate scholarly accomplishment and promise and dedicated to the tradition of academic freedom which seeks to separate the question of competence from exogenous factors.

Byrne, *supra* note 5, at 319. In short, "[a]cademic freedom has no meaning without peer review." *Id.*

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[8] "A decentralized decision-making structure founded largely on peer judgment is based on generations of almost universal tradition stemming from considerations as to the stake of an academic department in such decisions and its superior knowledge of the academic field and the work of the individual candidate." *Zahorik* v. *Cornell Univ.*, 729 F.2d 85, 96 (2d Cir. 1984); *see also* American Association of University Professors, *Statement on Procedural Standards in Faculty Dismissal Proceedings*, AAUP Policy Documents & Reports 10, 10 (1984) ("It seems clear on the American college scene that a close positive relationship exists between the excellence of colleges, the strength of their faculties, and the extent of faculty responsibility in determining faculty membership").

II. THERE IS A CONFLICT IN THE CIRCUITS OVER THE JUDICIARY'S PROPER ROLE IN REVIEWING UNIVERSITY EMPLOYMENT DECISIONS

A.

In applying Title VII to educational institutions, most courts, cognizant of the competing First Amendment values at stake, have held that judicial scrutiny of faculty employment decisions must be tempered in the academic context. Faced with the seeming tension between competing societal and legal values, most courts have tried "to steer a careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior." *Powell* v. *Syracuse Univ.*, 580 F.2d 1150, 1154 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978).

Theoretically, of course, there is no conflict between the university's First Amendment interest in "determin[ing] for itself on academic grounds who may teach," *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring), and judicial inquiry to ensure that a university does not determine on impermissible, *nonacademic* grounds who may join its faculty. *See, e.g.*, *Brown* v. *Trustees of Boston Univ.*, 891 F.2d 337, 360 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990); Byrne, *supra* note 5, at 319. Indeed, judicial inquiry, tempered by sensitivity to the complexities of academic evaluation and with due regard for the competing values at stake, is wholly compatible with the Constitution's protection of institutional academic freedom. The same inquiry, however, undertaken without modification of the usual *McDonnell Douglas* framework to account for the peculiarities of the academic setting may imperil academic freedom: a court's insensitivity to the subtle distinctions that must be drawn in assessing academic candidates may lead the court to decide for itself, on alternative academic grounds, who should teach.

To protect against this risk, the First Circuit, for example, has held that the standard *McDonnell Douglas*

framework must not be applied "mechanical[ly]" in the context of academic decisionmaking. *Villanueva* v. *Wellesley College*, 930 F.2d 124, 128 (1st Cir.), *cert. denied*, 112 S. Ct. 181 (1991). Rather, the "delicate equilibrium" between a university's academic freedom and the courts' duty to eradicate discrimination requires a modification of the burden the plaintiff must carry in persuading the court that the employer's articulated basis of decision is pretextual.

In nonacademic employment contexts, where an employer justifies its employment decision based upon its assessment of a candidate's qualifications, the unsuccessful candidate may sometimes demonstrate pretext by simple comparisons showing that her qualifications were, in fact, the same as or better than the successful candidate.[9] In the academic employment context, however, in part because of the far more complex problem of measuring a teacher-scholar against the standards of a particular institution at a particular time and in part because of the unique First Amendment considerations at stake, something more must be required. Consequently, in the First Circuit, the plaintiff

> must convince a trier of fact . . . that the defendant's articulated reasons for denying tenure "were 'obviously weak or implausible,' or that the tenure standards for prevailing at the tenure decisions were

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[9] *See, e.g., Lindahl* v. *Air France*, 930 F.2d 1434, 1439 (9th Cir. 1991) (because "the[] facts tend to show that [the successful candidate chosen in plaintiff's stead] may not have been the best person to lead the group, . . . they therefore suggest that leadership ability may not have been the real reason for choosing [the successful candidate] over [the plaintiff]"); *Alvarado* v. *Board of Trustees*, 928 F.2d 118, 122 (4th Cir. 1991) (plaintiff's greater experience and length of service as a janitor suggests that employer's claim that successful candidate was better qualified was pretextual); *Senigaur* v. *Beaumont Indep. School Dist.*, 730 F. Supp. 1200, 1205 (E.D. Tex. 1991).

> 'manifestly unequally applied.' The essential words are 'obviously' and 'manifestly.' A court may not simply substitute its own views concerning the plaintiff's qualifications for those of the properly instituted authorities; the evidence must be of such strength and quality as to permit a reasonable finding that the denial of tenure was "obviously" or "manifestly" unsupported.

Id. at 129 (quoting *Kumar* v. *Board of Trustees*, 774 F.2d 1, 15 (1st Cir. 1985) (Campbell, J., concurring), *cert. denied*, 475 U.S. 1097 (1986)).

The Second and Seventh Circuits have applied similarly deferential standards in the university employment context. The Second Circuit, for example, has suggested that comparisons between scholarly candidates are often of little use in divining pretext and that courts should stop short of the sort of *de novo* review of a candidate's academic credentials approved by the Third Circuit in this case. *Zahorik* v. *Cornell Univ.*, 729 F.2d 85, 92-93 (2d Cir. 1984) ("tenure decisions in an academic setting involve a combination of factors which tend to set them apart from employment decisions generally"); *see also Lieberman* v. *Gant*, 630 F.2d 60, 67-68 (2d Cir. 1980) (Friendly, J.) (trial judge "did not err in declining plaintiff's invitation to engage in a tired-eye scrutiny of the files of successful male candidates for tenure in an effort to second-guess the numerous scholars at the University of Connecticut who had scrutinized [the plaintiff's] qualifications and found them wanting").[10] "[F]or

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[10] The *Zahorik* court explained:

> Where the tenure file contains the conflicting views of specialized scholars, triers of fact cannot hope to master the academic field sufficiently to review the merits of such views and resolve the differences of scholarly opinion. Moreover, the level of achievement required for tenure will vary between universities and between departments within universities. Deter-

a plaintiff to succeed in carrying the burden of persuasion, the evidence as a whole must show more than a denial of tenure in the context of disagreement about the scholarly merits of the candidate's academic work, the candidate's teaching abilities or the academic needs of the department or university." *Zahorik*, 729 F.2d at 94.

In *Namenwirth* v. *Board of Regents*, 769 F.2d 1235 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986), the Seventh Circuit, too, was confronted with a case in which an unsuccessful tenure candidate rested her allegation of pretext almost entirely upon "comparative evidence concerning the qualification[s] of males tenured at about the same time [the plaintiff] was denied tenure." *Id.* at 1241. The court acknowledged that such comparisons, although perhaps "more difficult in the case of professional and academic employment decisions," are relevant in determining whether the employer's articulated reasons for its decision are pretextual. *Id.* at 1240-41. Nonetheless, the court refused to review *de novo* the univer-

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mination of the required level in a particular case is not a task for which judicial tribunals seem aptly suited.

729 F.2d at 93.

In addition to the concerns about the ability of courts to engage in effective comparative review of the academic evaluations and judgments of university faculty, some courts also have observed that such cases impose significant burdens on the resources of the trial courts. Judge Friendly, for example, noted in the *Lieberman* case that trial of the plaintiff's claim "produced a transcript of nearly 10,000 pages and almost 400 exhibits and consumed 52 days of court time." *Lieberman* v. *Gant*, 630 F.2d 60, 62 (2d Cir. 1980). As Judge Friendly observed, such exhaustive and costly trials are virtually inevitable where judges are required to review the enormously complex and fact-intensive process by which a university makes tenure and promotion decisions affecting a comparative range of candidates. *See id.* at 62 n.1 ("We do not understand how either the federal courts or universities can operate if the many adverse tenure decisions against women or members of a minority group that must be made each year are regularly taken to court and entail burdens such as those here incurred").

sity's assessments concerning the relative qualifications of academic candidates:

> The [plaintiff's] evidence consists for the most part of comparative evidence of research quality and potential. That means that it consists in large part of the opinions of academics who serve not only as experts on qualifications but also as decision-makers in the tenure process. It is not our role, as federal courts have acknowledged, to consider merely the hard evidence of research output and hours spent on committee work, and reach tenure determinations *de novo*.

Id. at 1242.[11] Although aware that deference to the assessments of those who are alleged to have discriminated may appear paradoxical, the court justified this deference on grounds of relative institutional competence.[12]

All three Circuits—the First, Second, and Seventh—recognize the broad relevance of comparative evidence of candidates' credentials in making out an indirect case for pretext, but agree that such evidence should succeed only

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[11] This Court, too, in another context, has recognized the judiciary's limited capacity for "evaluat[ing] the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.'" *Regents of the Univ. of Mich.* v. *Ewing*, 474 U.S. 214, 226 (1985) (quoting *Board of Curators* v. *Horowitz*, 435 U.S. 78, 89-90 (1978)).

[12] [I]n the case of tenure decisions we see no alternative. Tenure decisions have always relied primarily on judgments about academic potential, and there is no algorithm for producing those judgments. Given the similar research output of two candidates, an experienced faculty committee might—quite rightly—come to different conclusions about the potential of the candidates. It is not our place to question the significance or validity of such conclusions.

Namewirth v. *Board of Regents*, 769 F.2d 1235, 1243 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986).

where plaintiffs meet a heightened burden of demonstrating a "manifest" inequality of treatment. None, for example, would permit a plaintiff to prevail based upon comparative evidence suggesting that the plaintiff was *as qualified as* or *somewhat better qualified than* a non-protected fellow employee who won tenure or promotion. Rather, each would demand some higher showing—*e.g.*, "a claim that [the] plaintiff's qualifications were clearly and demonstrably superior to those of the successful [candidates]" [13] or "evidence . . . so compelling as to permit a reasonable finding of one-sidedness going beyond a mere difference in opinion." [14] What is important at this stage is not the precise formulation of the burden, but rather the judicial recognition that some *heightened* standard is appropriate in light of the unique countervailing values at stake in the academic setting.

B.

The Third Circuit has squarely rejected the view that academic employment decisions merit different consideration under Title VII. *See Bennun* v. *Rutgers State Univ.*, 941 F.2d 154, 174 (3d. Cir. 1991) ("no special deference is to be paid to the tenure and promotion decisions of universities when they are scrutinized under Title VII") (emphasis omitted); *Kunda* v. *Muhlenberg College*, 621 F.2d 532, 545 (3d Cir. 1980).[15] Although the Third Circuit previously had declared its view that academic employment decisions were to be tested against the same *McDonnell Douglas* analysis applied to nonacademic employers,[16] that declaration had been tempered with simul-

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[13] *Lieberman*, 630 F.2d at 68.

[14] *Brown* v. *Trustees of Boston Univ.*, 891 F.2d 337, 347 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990).

[15] *Accord Jepsen* v. *Florida Bd. of Regents*, 610 F.2d 1379, 1382 (5th Cir. 1980).

[16] *See Kunda* v. *Muhlenberg College*, 621 F.2d 532, 545 (3d Cir. 1980).

taneous admonitions that courts "should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure." [17] In *Bennun*, however, it is evident from the inquiry actually undertaken by the court that the Circuit has abandoned any effort at moderation:

> In its disparate treatment analysis, the district court compared Bennun's review packets [containing his *curriculum vitae*, peer review evaluations, and similar papers] with those of Dr. Ethel Somberg, a professor in the same department as Bennun. Somberg had been promoted from Associate Professor to Full Professor in 1979. Relying in part on its comparison of Somberg's academic credentials with Bennun's, the district court held that Bennun had made out a *prima facie* case of disparate treatment and that Rutgers' proffered nondiscriminatory reason, failure to meet the university's high standards for full professorship in the judgment of his peers, was a pretext for discriminat[ion] . . . .

Bennun, 941 F.2d at 158-59 (citations omitted).[18]

The *Bennun* court's comparison of the relative "academic credentials" of the two candidates, based upon nothing more than the hypothesis that Dr. Bennun was at least as qualified as Dr. Somberg, points out the very real dangers presented by the insensitive application of traditional Title VII standards to the academic setting. The court, for example, assessed "the extent" of the candidates' respective research efforts by tallying up their

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[17] *Kunda*, 621 F.2d at 548.

[18] Certainly Chief Judge Sloviter, who dissented to the denial of rehearing *en banc*, believed that the *Bennun* decision marked a sharp change in course: "In the present case, it would appear that this Court has abandoned the doctrine of restraint set forth in *Kunda*." *Bennun* v. *Rutgers State Univ.*, 941 F.2d 154, 181 (3d Cir. 1991) (Sloviter, C.J., dissenting from denial of rehearing *en banc*).

respective number of publications listed in their promotion packets, *see Bennun* v. *Rutgers*, 737 F. Supp. 1393 (D.N.J. 1990), *aff'd in relevant part*, 941 F.2d 154 (3d Cir. 1991); it concluded that "Bennun's packet . . . was objectively stronger than Somberg's in that it contained more letters from significant scholars in the Biochemistry field," *id.* at 1406; it decided that "various evaluations of Bennun's teaching were very similar to evaluations of Somberg's," *id.*; and, "perhaps most importantly," it disagreed with "the University's contention that Bennun was mediocre in all areas besides research," *id.* at 1406-07. Based on its independent and *de novo* assessment of the relative academic merit of the two faculty members, the court concluded that "the reasons articulated by the University concerning Bennun['s academic merit] are simply not believable," and dismissed them as a pretext for invidious racial discrimination. *Id.* at 1408.[19]

C.

Amici do not contend that university tenure and promotion decisions may never be tested by way of comparative analysis between the complainant and other, successful candidates. There are cases in which a university's

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[19] The conflict between the Third Circuit's approach and the more restrained approaches of other Circuits is obvious. *Compare, e.g., Bennun*, 941 F.2d at 158 (affirming the trial court's judgment for Dr. Bennun based upon "its comparison of Somberg's academic credentials with Bennun's") *with Lieberman* v. *Gant*, 630 F.2d 60, 67 (2d Cir. 1980) ("[T]o infer discrimination from a comparison among candidates is to risk a serious infringement of first amendment values. A university's prerogative 'to determine for itself on academic grounds who may teach' is an important part of our long tradition of academic freedom. . . . Although academic freedom does not include 'the freedom to discriminate', . . . [academic] freedom cannot be disregarded in determining the proper role of courts called upon to try allegations of discrimination by universities in teaching appointments. The Congress that brought educational institutions within the purview of Title VII could not have contemplated that the courts would sit as "Super-Tenure Review Committee[s]' . . . ; their role was simply to root out discrimination") (citations omitted).

proffered reliance upon a particular, ascertainable employment criterion could reliably be verified through such comparisons.[20] It is also possible that this Court might craft successfully some heightened proof standard—along the lines suggested by the First, Second, and Seventh Circuits—under which plaintiffs could prove pretext through comparative evidence only where the evidence revealed such clearly unequal treatment that the university's interests in legitimate self-governance could not possibly be implicated.

It is apparent, however, that the approach adopted by the Third Circuit in *Bennun* leaves colleges and universities vulnerable to judicial findings of liability (and potentially intrusive remedial orders[21]) wherever there are superficial similarities in the *curricula vitae* of successful and unsuccessful candidates. The only escape allowed by *Bennun* is for universities effectively to abandon the searching, though highly subjective, peer review sys-

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[20] For example, if a university claimed to withhold a promotion on grounds of an ironclad rule that all candidates must hold a terminal degree in their field, evidence that the university had promoted nonminority candidates without such degrees could reliably be used to suggest the university's reason was pretextual. *Cf. Kunda* v. *Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980). Moreover, there are other methods, not involving comparison of candidate qualifications, by which a complainant could demonstrate that an academic employer's stated reasons were pretextual, including evidence of "[d]epartures from procedural regularity" in the university's decisionmaking process. *Zahorik* v. *Cornell Univ.*, 729 F.2d 85, 93 (2d Cir. 1984); *see also Kunda*, 621 F.2d at 546 (defendant-university advised only male employees of its terminal-degree requirement, leaving complainant unaware until it was too late to satisfy the requirement).

[21] *See, e.g., Brown* v. *Trustees of Boston Univ.*, 891 F.2d 337, 359-60 (1st Cir. 1989) (ordering that Title VII plaintiff be instated as a tenured professor over university's protest that "tenure is a significantly more intrusive remedy than remedies ordinarily awarded in Title VII cases . . . because a judicial tenure award mandates a lifetime relationship between the University and the professor"), *cert. denied*, 110 S. Ct. 3217 (1990).

tem in favor of a system in which each candidate's paper record is "objectively" compared with all those who went before, to ensure perfect and verifiable uniformity among decisions. But a purely objective system would be useless as a device for comparing academic achievement. Moreover, what makes the approach below particularly perverse is that, even assuming *the courts'* ability to discern accurately the objective "competence" of various candidates, it ensures that each new candidate need only be as competent as the least competent previously successful candidate. The adverse impact of that approach is especially revealing here where the research skills of the earlier candidate (Dr. Somberg) were concededly her weakest area of competence, and yet those skills became the benchmark for measuring the merit of the next candidate (Dr. Bennun), whose research skills were concededly his strongest area of competence. Because academic talents are by their nature extremely diverse, some heightened proof of disparity among candidates more properly balances the competing interests of academic freedom and antidiscrimination.

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"The courts have struggled with the problem [of how to scrutinize a university's assessment of faculty qualifications without infringing legitimate values of institutional autonomy] since Title VII was extended to the university, and have found no solution." *Namenwirth*, 769 F.2d at 1243. Indeed, six years after the Seventh Circuit issued that lament, a comparison of the two most recent court of appeals decisions—the First Circuit's *Villanueva* decision and the Third Circuit's *Bennun* decision—confirms that, if anything, the circuits have staked out even more conflicting approaches.

This Court's review of the important issues presented by the application of the *McDonnell Douglas* framework to the academic employment setting is urgently needed to resolve the enduring conflicts among the various circuits.

In addition, this Court's review is warranted to consider whether the sort of judicial intervention into faculty tenure and promotion decisions approved by the Third Circuit in *Bennun* is compatible with the First Amendment's "special concern" for the university's "right to determine for itself on academic grounds who may teach."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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